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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 234.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

ABE BEHYMER.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

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THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, vs. ABE BEHYMER.	No. 224.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This suit was originally brought in the District Court of Gregg County, Texas, on April 6, 1900, for the recovery of damages for personal injuries sustained by plaintiff February 7, 1899, while in defendant's employment as a brakeman.

Plaintiff alleged (Tr., p. 7) that at the time of the injury he was a brakeman in the employment of the defendant on a freight train; that on the morning of February 7, 1899, his train went west from Long View Junction, and arrived at Big Sandy, where two cars,

then standing at the end of a string of cars on a side track, were to be transferred to his train; that the weather was very cold, the tops of the cars being covered with sleet, snow and ice, which fact was known to him and to the conductor and engineer of the train; that obeying his orders he went on top of the cars on the side track to loosen the brakes, and while doing so the engine was attached to said cars and drew them westward up the grade and beyond the switch at which time they were suddenly stopped by the conductor causing a jerk of the train on account of which he lost his balance, he being at the time upon the foot or running board on the top of a car, and while endeavoring to recover his balance, the bottom of his "pants" caught upon a nail protruding from the running board and threw him between the cars, breaking his leg and injuring him, as he states, for life. He alleged also that the injuries were caused by the negligence of the conductor and the engineer.

He further alleged that he was taken to defendant's hospital for medical and surgical treatment, and that the surgeons there in said hospital were negligent and careless and unskillful in the treatment of his injuries, and that owing to such negligence and carelessness the bones failed to knit together, in consequence of which his leg was useless, and he was thereby rendered a cripple for life.

The case was then removed into the United States Circuit Court for the Eastern District of Texas on the ground that a federal question was involved because of the federal character of defendant corporation. Defendant (Tr., p. 18) demurred to the petition generally and specially excepted to all those parts of the petition which sought to hold defendant liable for damages

by reason of unskillful and careless medical and surgical treatment of plaintiff's injury.

Defendant also entered a general denial, pleaded contributory negligence on the part of the plaintiff, and that plaintiff was familiar with the operation of freight trains; that he was engaged as brakeman at his own instance and request and upon that of his father; that when employed October 4, 1898, plaintiff agreed to and signed an application in which he specially assumed the risk of all such accidents as that by which he was injured, and assumed all risk of injury therefrom; denied that the conductor or any other employee had made any promise as to the movement of the train while plaintiff was upon the car. Defendant also alleged that the car from which the plaintiff fell was one belonging to the St. Louis and Southwestern Railway Company and not to defendant, and that its condition was not known to defendant's employees. It denied that there was a protruding spike on the foot-board or walk-way and alleged that upon an inspection immediately after the accident the same could not be found. Defendant also alleged that plaintiff while in the hospital refused to obey the advice and instruction of the surgeons, and against such advice walked about the hospital, left the hospital and traveled about the country endeavoring to use his limb, and that he was otherwise grossly negligent and careless in his conduct for which defendant is not liable.

Plaintiff then filed certain exceptions, which were subsequently overruled.

Upon the hearing of the demurrer the same was sustained as to the charges of unskillful treatment of the plaintiff in the hospital, and said allegations were stricken out.

At the trial, the Judge in his charge (Tr., p. 104) withdrew from the jury the consideration of the allegations of the petition in regard to the acts of the conductor, leaving but two questions of negligence for the jury to consider, namely: in the handling of the train, sudden stopping and jerking by which plaintiff said he was caused to fall, and the allegation that there was a protruding spike in the foot-board on top of the car.

There was a verdict in favor of the plaintiff in the sum of ten thousand dollars ($10,000) for which amount and costs judgment was entered. Upon writ of error the judgment was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, and from this judgment of affirmance plaintiff now brings this writ of error to this Honorable Court.

Assignments of Error.

I.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas.

II.

The Circuit Court of Appeals erred in its jugment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to charge the jury as requested by plaintiff in error, as follows:

"Upon the law and the facts in this case, the plaintiff is not entitled to recover, and you are instructed to return a verdict for the defendant."

Because (1) plaintiff assumed the risk by exposure to which he was hurt, in accepting employment as a brakeman; and (2) there was no credible evidence to warrant a verdict for the plaintiff, (3) because plaintiff was guilty of contributory negligence, and upon all the evidence was not entitled to recover.

III.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in its main charge to the jury in the following portions thereof:

"It is the duty of the parties in charge of the train, 'in moving it,' to use ordinary care in its handling. By the term, 'ordinary care' is meant that degree of care and caution that a person of ordinary prudence under the same circumstances, would use; an ordinarily prudent man would use under the circumstances. There has been considerable proof in this case that this particular car or train of cars was moved and stopped as freight trains were ordinarily moved and stopped. Upon that question it might show that the care required by law, was used, or it might not show the care. The question for you to determine is, under the facts of this particular case, and under all the evidence introduced, did the parties in charge of the train use ordinary care in handling it, in so far as their duty required to avoid injuring any one; that is, did the operators in charge of the train as to starting it or stopping it, use the degree of care that a person of ordinary prudence would use in that business, under the circumstances. If they used the degree of care that an ordinary prudent person, that is, a person of ordinary prudence, under the circumstances, would have used, then the ground of negligence would fall, and plaintiff would not be entitled to recover upon that ground. But if from the evidence you find as a fact that ordinary care, as has been defined to you, was not used by the parties in charge of the train and

that the plaintiff was injured in consequence thereof, without contributory negligence on his part, he would be entitled to recover."

"That is, if from the evidence it appears that the parties in charge of the train used ordinary care, as defined, that is, the care that an ordinarily prudent person under like circumstances would have used, then even if plaintiff was hurt by the movement of the train, if the moving was done in the manner an ordinarily prudent person would have done, then he cannot recover. But if they failed to use ordinary care, as defined, that is, such care as an ordinarily prudent person under the circumstances would have used, and the plaintiff was, without his fault, injured, he can recover."

"Therefore, if you find from the evidence that the plaintiff was injured by the negligence in the manner in which the train was handled, and he was injured without his fault by reason of the manner in which they were handled, he would be entitled to recover."

"If he fell because of the condition of the top of the car, and that the car was being handled with the degree of care that an ordinarily prudent person would handle a car, and that he slipped and fell on account of the condition of the ice, and that was the cause of the fall, the plaintiff would not have a cause of action, and you will find for the defendant."

Because the question was, and the rule is, was the train at the time plaintiff fell therefrom being operated in the usual and ordinary way of handling freight trains and in switching cars, and was the jerk, bump or jar any greater than is ordinarily incident to the handling of freight cars and trains in switching. If not, it was an assumed risk. And because said quoted passages limit the inquiry as to persons of ordinary prudence, when it should be as to whether engineers and train operatives ordinarily and usually handle trains in the way that one was handled at the time of the accident.

IV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in the following part of the main charge:

"The defendant also pleads in their answer that the plaintiff was guilty of contributory negligence by which he was injured in defense. By contributory negligence is meant the doing of an act that a man of ordinary prudence and caution would not have done under the circumstances, which contributed to his injury, or it consists in the failure to do an act that a man of ordinary care and prudence would have done under the circumstances. It means that if the plaintiff was negligent, and the defendant was negligent, no recovery can be had. It means that the defendant must have been negligent and the plaintiff not negligent."

In failing in this passage, as well as the entire charge, to instruct the jury that, if defendant in error's negligence contributed in any degree to the accident and injury, he could not recover, even though plaintiff in error had been negligent.

V.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas and in holding that said Court committed no error in its main charge in failing to instruct the jury upon an issue made by the pleadings, upon which there was evidence, to wit: That if plaintiff knew that the tops of the cars were covered with ice and were dangerous to brakemen going on top

of same, then he was not bound to go into such dangers; and it was incumbent upon him to use that high degree of care for his safety commensurate with the known dangers to be encountered, and that, if he failed to do so and was injured, he would be guilty of contributory negligence and could not recover.

VI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error as follows:

> "You are further charged that, if you believe, from the evidence, that by proper surgical treatment and attention and by proper conduct and submission to treatment on the part of the plaintiff, his broken leg would have (been) restored to soundness, then he would not be entitled to recover any damages against the defendant, even if the defendant was guilty of negligence, as defined in the general charge beyond an amount sufficient to compensate him for loss of time and mental and physical pain during the time it would have required to restore his leg to such sound condition."

VII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"You are further charged that all the evidence in this case concerning the nature of plaintiff's injury to his leg, and the proper and necessary treatment

thereof, is to the effect that by proper surgical and medical treatment, his leg could be, and could have been restored to a condition of usefulness and soundness. It is further in evidence without contradiction, that plaintiff was solicited by the surgeons in charge of defendant's hospital, and by Dr. Saunders, a surgeon at Ft. Worth to enter his hospital and receive there surgical and medical treatment for the restoration of his leg, and that plaintiff declined to take such surgical and medical treatment and attention, and it is further in evidence by the plaintiff himself, and without contradiction, that he has had no medical attention or care for his leg since he left the hospital of the defendant at Marshall, and you are further instructed that the plaintiff cannot recover any damages he may have suffered by reason of the injury to his leg, or for any permanent impairment of his leg, beyond an amount that would reasonably compensate him for the mental and physical suffering immediately caused by the injury to his leg, during the time in which he might have been restored by proper medical and surgical treatment and attention, and for any other injuries, if any, he may have suffered from the original accident, then he could not recover damages for that unless you believe from the evidence under the instructions heretofore given you, that the company, its agents or servants, were guilty of negligence as defined by you, in causing the original accident and injuries."

VIII.

The Circuit Court of Appeals erred in its judgment ment affirming the judgment of the Circuit Court for Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

" You are further charged that it is a matter of common knowledge that freight trains cannot be, and are not usually moved or stopped with that absence of jerk or jar characteristic of the movement of passenger trains, and that in moving freight trains, there are necessarily jerks and jars caused from taking up and running out of what is called the slack, and if you be-

lieve from the testimony that plaintiff's injuries were caused by his fall from the car, caused by the taking up, or running out of the slack, and that such was no greater in degree than is ordinarily incident to the starting and stopping of freight trains, and that plaintiff's fall was caused by this in connection with the slippery character of the top of the car, then you are instructed that these were risks assumed by the plaintiff, and he cannot recover for any injuries occasioned thereby."

IX.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"You are further charged that the uncontradicted evidence in this case is that the string of cars from which plaintiff fell, was being at the time of the accident, operated and stopped in the usual mode and manner of operating and stopping freight trains, if, therefore, you believe from the evidence that plaintiff's injury, if any, was caused by the manner of operating and stopping the train or string of cars, then plaintiff cannot recover in this case."

X.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"You are further charged that in taking employment a brakeman assumes all risks necessarily incident to his employment, and if you should believe from the evidence in this case that plaintiff was injured by being exposed to the risks necessarily incident to his employment, he cannot recover."

XI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"You are further charged that where one voluntarily enters into a contract of hiring with a railway company, and assumed all the risks and hazards ordinarily and usually incident to such employment, he will be presumed to have contracted with reference to such risks and hazards."

XII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in giving special charges requested by plaintiff in error, with the following qualifications made by the Court at the request of the defendant in error:

"In connection with special charge No. 9 and No. 11 of defendant, the plaintiff asks the court to instruct the jury: That while the employe assumes the risks ordinarily incident to his employment, he does not assume the risks incident to his employment which may be occasioned or caused by the negligence of the other employes operating the train."

XIII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said

Court committed no error in refusing to give special charge asked by plaintiff in error, as follows :

" You are further charged that plaintiff does not allege in his petition any negligence on the part of defendant company in allowing its cars to become coated with ice or sleet, and if you believe from the evidence that plaintiff was injured in consequence of slipping or falling by reason of the snow, ice or sleet on top of the cars, then plaintiff cannot recover for any damages he may have received by reason of such fall."

And in giving said special charge with the following qualifications :

" Plaintiff asks that if this charge be given, then it be given with this qualification : Provided, his injuries were not caused by reason of the negligence, if any there was, of the employes operating the train."

XIV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows :

" You are further charged that if you believe, from the evidence, that the present condition of plaintiff's leg was caused by improper treatment or want of attention on the part of surgeons, then you are charged that the defendant is not liable for the damage caused by such condition, although you may believe from the evidence the defendant, its agents or servants were guilty of negligence in causing the injury, as defined in the general charge."

And in qualifying it, and giving it with the qualifications as follows :

" Plaintiff asks that, if this special charge be given, it be qualified or explained as follows : ' But in such case, though you may find that the plaintiff's injuries,

as they now exist, may have been caused by failure to give him proper treatment or want of attention on the part of the surgeons, yet he can recover for all the injuries occasioned by the original accident, and all the damages that he may have suffered or may hereafter suffer as the direct and proximate result of his said original accident, as may be shown by the testimony, provided the defendant company is liable at all under the charge of the court.'"

XV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said court committed no error in refusing to give special charge asked by the plaintiff in error, as follows:

"You are further charged that if you believe from the evidence that the cars from which the plaintiff fell were covered with sleet and ice, and that the fact was known to plaintiff, and if plaintiff knew that walking upon the cars in that condition was dangerous, then, although you may believe from the evidence that he was told by the conductor to go upon the top of the cars, and set or loose the brakes, he was not obliged to do so, and if he did so with the knowledge that their conditon made it dangerous to him in moving the cars, he will be held to have assumed the risk of all such dangers, and if his injuries were caused by such condition of the cars, moved in the ordinary and usual way, and stopped in such way, he cannot recover for any injuries occasioned thereby."

And in giving said special charge with the interlineations and erasures made by the Court, as appears in the following copy of said charge, with the interlineations shown in parenthesis and the erasures shown in brackets:

"You are further charged that if you believe from the evidence that the cars from which plaintiff fell were covered with sleet and ice and that that fact was

known to plaintiff, and that if plaintiff knew that walking upon the cars in that condition was dangerous, then, although you may believe from the evidence that he was told by the conductor to go upon the top of the cars and set or loose the brakes, he was not obliged to do so, and if he did so with the knowledge that their condition made it dangerous to him in moving the cars, he will be held to have assumed the risk of all such dangers, and if his injuries were caused by such condition of the cars (moved in the ordinary and usual way and stopped in such way) (and not by the negligence of those operating them, if any) he cannot recover for any injuries occasioned thereby."

XVI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows :

"You are therefore charged that it was and is the duty of the plaintiff to take such measures, and submit himself to such medical treatment and care as would lessen the injury or damages to him, if any, and if you believe from the testimony that the present condition of the plaintiff's leg is caused by his own negligence or carelessness, or by failure to follow the direction of *the* his medical attendants and advisers, and by failing to submit himself to the proper and necessary treatment of his leg, and that otherwise his leg could have been restored to a sound condition, or the damages or injury repaired to any extent, then he cannot recover damages against defendant for any condition of his leg or for want of healing or repair of the injury caused by such conduct on his part."

And in making the interlineation and giving the charge so interlineated, as shown by the following copy of said charge, with the interlineations made by the Court shown in parenthesis :

"You are further charged that it was and is the duty of the plaintiff to take such measures, and submit himself to such medical treatment and care as would lessen the injury or damage to him, if any, and if you believe from the testimony that the present condition of the plaintiff's leg is caused by his own negligence or carelessness, or by (his negligent) failure to follow the directions of his medical attendants and advisers, and by (negligently) failing to submit himself to the proper and necessary treatment of his leg, and that otherwise his leg could have been restored to a sound condition, or the damage or injury repaired to any extent, then he cannot recover damages against the defendant for any condition of his leg (brought about by any negligence of his own if he has been negligent) or for any want of healing or repair of the injury caused by such conduct on his part."

XVII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to set aside the verdict and judgment herein, and in overruling defendant's motion for a new trial as made, upon the ground that the verdict of the jury and judgment was grossly excessive in amount, showing that the jury were influenced by passion and prejudice and did not act upon a proper consideration of the facts and the law in the case.

XVIII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to set aside said verdict and judgment, and in overruling defendant's

motion for a new trial as made, upon the ground that the verdict of the jury is against the law and the evidence; and because the verdict of the jury was against the overwhelming preponderance of the evidence, in that (1) the evidence showed that at the time of the accident the string of cars from which plaintiff fell, was being hauled in the ordinary and usual way of handling, stopping, starting and hauling freight trains, and that the running out of the slack, as testified by all of the witnesses, and as it then occurred, was no more than was ordinarily incident to such movements of freight trains, and that plaintiff's fall was caused by such movements in connection with the ice on top of the cars; (2) that all of the expert testimony in the case was to the effect that plaintiff's leg, by proper care and treatment, could have been, and can be, restored to its original soundness, and that there is no permanent impairment of his leg and that its present condition arose solely from plaintiff's own carelessness, and lack of medical attention after he left defendant's hospital.

XIX.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error, because it appears from the record in this case that the judgment was given for defendant in error Abe Behymer, whereas, by the law of the land and under the facts in this case, it should have been given for plaintiff in error.

Brief.

We believe the following facts pertinent to the questions raised to be undisputed or established beyond any doubt:

1. At the time he was hurt plaintiff had been in the employment of the defendant, for about three months, as freight brakeman. On that morning he was working on a freight train going west from Longview Junction, and upon its arrival at Big Sandy, a junction point with the Cotton Belt Road, where some switching was to be done, he mounted a string of cars on the side track to let off the brakes in order that the engine might haul on to the main track and cut off two cars which were to go into said train. While engaged in letting off the brakes the engine coupled on to the string of cars and began moving them west on to the main track, and about the time the rear car of the string reached a point where the switch joined the main track, the engine stopped and the slack ran up towards the engine and then ran out again, at about which time plaintiff, being on top of Cotton Belt car No. 6500 in the string, fell from the car, breaking his leg.

2. There was a very steep up-grade going west on the switch or side track and on the main line at that place.

3. The switch track on which said string of cars was standing joins the main track of the Texas and Pacific Road about at the crossing of the Cotton Belt track, and the engine and string of cars was moving west and up-grade.

4. The morning was very cold, sleeting and snowing, and the tops of all the cars were covered with a thick coating of sleet, snow and ice. These conditions were obvious and well known to plaintiff and the other train employees.

I.

The Court should have given the peremptory instruction to return a verdict for the company as requested, because the facts showed that Behymer was hurt solely by exposure to an assumed risk, that is, a risk incident to his employment; because there was no evidence to warrant a verdict for Behymer and because the proof showed he was guilty of contributory negligence and voluntarily exposed himself to the conditions of the service of which he now complains.

Behmyer, as a brakeman, by his application for employment (Tr., 55) as well as by the law in such cases, assumed all the risks ordinarily incident to his work as such, and that the risk through exposure to which he was injured was of that nature, seems from the evidence to be clear. If his going upon the tops of the cars could be deemed to be extra hazardous in their then condition, he was aware of that condition, recognized it as dangerous and voluntarily assumed the risk, for he says he told the conductor it was dangerous before going upon the cars (Tr., 32).

Behymer was the *only witness* for the plaintiff below testifying as to conditions and what happened at Big Sandy at the time of the accident, and he nowhere says that the jerk or movement of the train which caused him to fall was an unusual, extraordinary or unnecessary movement or jerk; while all of the company's witnesses testified that there was nothing unusual or extraordinary in the movement or jerk of the train at the time he fell. The whole of plaintiff's testimony on this point was as follows:

"After the engine coupled on to the cars they pulled out pretty fast up above the switch, and when we got up to about clear, it stopped suddenly and the slack run forward and the cars rebounded and that threw me off my balance, and in trying to regain my balance the bottom of my pants was caught on a nail in the runningboard and it threw me between the cars. (Tr., 33.) * * * He moved the cars after I released the brakes, that was the usual and proper way of moving the cars, that is, to move them after I had released the brakes. * * * He made a quick stop. The sudden stop of the cars made the slack run up to the engine and jerked the cars on the rear end. That stop didn't have very much effect on me. It staggered me a little bit * * * When the engine stopped that had the effect of making the cars run forward, on account of the slack, or making them bump against the engine. The engine jerked again and that kinder gave them another sudden jerk. (Tr., 35.) * * * When he opened the engine it jerked the car again. The jerking of the cars threw me off my balance. The cars started the second time. He started them with a jerk—a sudden jerk, it was a pretty good jerk. I mean it was a good heavy jerk. I don't know that I lost my balance entirely by reason of the first jerk of the cars. I think it staggered me. Q. I will ask you again whether the first stopping of the cars caused you to lose your balance or not? A. Yes, sir. * * * The engineer of that train stopped those cars by a sudden stop, the cars ran forward quick and sudden, just as quick as they could." (Tr., 35.)

On cross-examination:

"Now it didn't make any difference how the stop was made; the cars would have a tendency to run to-

gether in going up the grade, and then they would stop, the grade in the rear of the train would stretch the cars out again, they would run down hill until the slack was out. (Tr., 39.) * * * When the train pulled out of the siding on to the main line it was going real fast, could not tell you how fast; am not an expert. When the engine stopped the cars went on towards the engine, that is, they were taking up the slack, and when the slack ran out the cars came back down grade East. * * * The tops of these cars were pretty slick that morning. The whole tops of the cars and the runningboards were pretty slick with ice. * * * I suppose I was 3 or 4 feet from the end of the car when I first lost my balance and began to slip on the top of the car. I saw the nail about the time I began to stagger on the top of the car. My foot slipped. I was already slipping on the ice when I saw the spike. The jerk of the cars is what started me, and I couldn't regain my balance because the jerk was too heavy. The slippery character of the car kept me from regaining my balance some. * * * It was the first stopping of the train and the running together of the cars that caused me to lose my balance. I lost my balance when they first stopped and then when the cars went down the grade that helped me on and threw me down. I first staggered back when the train stopped. I staggered towards the other end of the car and then when they went back it jerked me over the other way towards the end of the car. Think I would have had trouble in holding my balance on top of that car if it had not been for the ice. The jerk, I am confident, would have thrown me. Think it would have thrown me to the other car. Don't know whether I would have fallen down on the ground or not."

It will be noted here that Behymer does not give the nail as the cause of his falling, for he had already lost his balance and thinks he would have been thrown to the next car anyway.

"I think the jerk was such as to have thrown me off the car. Don't know that it would have thrown me to the ground, but it probably would. Just a second before I went to fall I saw that nail. My pants caught on the nail. I first knew my pants caught on the nail just as soon as it threw me down" (Tr., 39 and 40).

The company's witnesses all testify substantially that the movement or jerk of the train at the time Behymer fell was no more than that ordinarily incident to the operation of freight trains, as follows (for the sake of brevity will give only the substance of the testimony, without quoting the language entire):

Key, conductor, testified: The cars were comparatively still when Behymer lost his balance. The engine had stopped and the slack came back. After he lost his balance about the only move the cars made was the slack running out; that was after he lost his balance. I noticed that string of cars. When the engine pulled out and stopped, the slack out—that is, the train stretched out its full length. There was nothing unusual in their coming back. There was no extraordinary stop of the engine or running out of the slack. When the engine stopped, of course the cars behind the engine went on forward and bumped against the others, and then the slack ran back out. He lost his balance when the cars bumped up against each other, and he fell as the slack ran out. They were moving about seven or eight miles an hour in going out of the switch. If they had been pulled out slowly there would have been little slack. In pulling a train there is no slack in it. It depends on the speed whether the slack will run up against the engine. Could have run up there at such a rate that the cars would have stopped themselves; that was not done. The train stopped as if he had put air on the engine Putting on air is what caused those cars to bump up against one another. What caused the slack to come back was that they had run up together and closed up the slack. The engineer did that day just like he usually does, stopped the cars just like he usually

stops in good weather; just as if there had been no ice on top of the cars. Made no allowance for the fact that the tops of the cars were encased in ice, that I took notice of. Saw no difference between the way they were operated then and in good weather. When tops of cars are encased in ice, more difficult to keep your balance. At the time he fell on train, they had stopped all except the motion of the cars running back (Tr. 50–55).

C. A. Smith, engineer: Were not moving over six or eight miles an hour. Had quite a string of cars. Made the usual stop. Just stopped when I got the signal to stop. When I made the stop the slack of the cars ran up towards the engine. Had my brakes set, and the slack of the cars running back caused a little jar. When I stopped the slack ran up towards the engine. There was nothing unusual in that. When I made the stop out there to let the cars go in on the main line, the stop was nothing unusual; was no more sudden than usual. I had no control over the slack in the cars—that is, by the motion of the cars themselves—had no air that ran to the cars. Rate of speed that morning was about the usual rate of speed in making switches of that kind; about the usual speed I would use in making that kind of a switch under the same circumstances. It is not a fact that I was going faster than usual in pulling that string of cars out of the siding; was using just about the same speed. It was up grade where my engine was standing and up grade for some distance beyond, possibly a quarter of a mile. It is possible cars could have been pulled up in such manner that the

weight of the train would have stopped itself. If I had cut off steam and let the train roll far enough, the weight of it would have stopped it. Did not choose to let it roll; shut off the steam and put on the air and made my stop. Was not running as fast as I would run on level track. Condition of weather and top of cars had nothing to do with my stop at all. Can't say I took into consideration or made allowance for condition of weather. Knew there was ice on top of cars and everywhere (Tr., 60-62).

B. T. Stelson, brakeman on same train: When slack came back from engine I saw that Behymer was going to fall; that he had slipped, and I hallooed to the swing man not to cut them off. The engine was not in motion at the time he slipped, but the slack was. Some slack in all freight trains. Engine had stopped at time he fell. Fell just as soon as the cars could run up and come back. It was when the slack ran out he lost his balance (Tr., 67). There was nothing unusual in the motion of the slack running out of that train. The slack always runs back down grade. The engine was not stopped any more sudden than it ordinarily is. The switching was done just like it is done every time there. Engineer made no allowance for condition of weather. Just went ahead with switching (Tr., 68). The train was not stopped any more sudden than usual. They usually stop it there very suddenly because it is up-grade, and they put on the brakes and stop the cars, and the cars run back; that makes the cars bump back and forth. The engineer stopped the train that morning with the usual stop. He stopped so the cars behind the engine ran up against each other. They

do that nearly every time they stop, and then the slack runs back the other way. There was no difference in the stop that morning and the usual stop. They sometimes stop that way and sometimes make a good easy stop. This was a sudden stop. Engineer could have cut off steam and allowed train to slow down by its own motion without bumping. Could have done that; but we would never get over the road; always hurry as fast as we can. Employees paid by the mile and the time they are out. Would have been hard to have pulled that train out of that switch in such a way that the slack would not have run forward and back. Could have pulled out and let the weight of the train stop itself. Still slack would have run back. Could hardly have stopped the train so gradually that slack would not have run forward (Tr., 69).

H. A. Williams, company's agent at Big Sandy, testified: Saw him (Behymer) when he first began to fall. Train pulled up, and about the time it stopped plaintiff seemed to lose his footing and to be slipping on account of the ice being on top of the car; and the train stopped, but he just kept going and went down between the cars. Next I saw he was scrambling out from between the cars (Tr., 70). I noticed the stop that morning. There was only a few seconds between the stopping of the engine and running out of the slack of the train and Behmyer losing his footing. It was almost instantly. Am familiar with the switching of freight trains at that point. There was nothing unusual about the stop made that morning, nor the running out of the slack in the train. Heard Behmyer say he slipped and fell off the cars. Did not hear him say

anything about his pants catching on a nail (Tr., 71, 72). That train stopped suddenly enough for the cars to run forward and bump up against the engine and each other. The slack ran back. Considerable grade there. The engine and cars were stopped about the usual way that morning. Stop was about the ordinary stop. In the ordinary stop made by engineers it is sudden enough to make the cars bump up together (Tr., 73). I think the action of the cars in running forward and bumping up together and then coming back had something to do with causing him to lose his balance, and the top of the cars, I think, had something to do with it (Tr., 74).

J. E. Ferguso. fireman, said: Suppose we ran eight miles an hour in taking them out, possibly a little faster or slower. There was nothing unusual about the speed. There was nothing unusual in making the stop. We went on doing our work just the same as we did any other time in running the engine and stopping it (Tr., 88, 89).

Wm. Seay, brakeman, says: Suppose train pulled up at speed of about six miles an hour and the stop was made as usual. In making a stop on grade like that the cars run up against the engine, that is, the slack would run up and then the grade would carry the slack back. I suppose between two couplings the slack is about four or five inches (Tr., 93).

Thus it is seen that the six witness for the company who saw the accident testified that the movement of the cars by which Behymer says he was injured was not at all unusual in its character, and Behymer himself not stating that it was, it would seem that it ought to be

an end of his case on the facts. That there was no negligence assigned or proven upon the fact of the cars being coated with sleet and ice, and the risk was certainly one he assumed in his application for employment (Record, pp. 55, 56), and is a risk incident to such employment.

In *Central R. R. & B. Co. vs. Sims, 80 Ga., 749*, plaintiff, an employee on the gravel train, was going from one car to another, the train being in motion, when there was a jerk, and he was thrown between the cars and seriously injured.

Motion for new trial because the verdict for plaintiff was against the law and the evidence overruled. Exception.

Held, BLECKLEY, *Ch. J.* (p. 755):

"We think that such jerks upon a train of that character must be expected to occur, and that the risk of employment embraces them. * * * Employees upon such trains must incur such risk; they are apparently incident to the business. And we think that, under the evidence in this case, there was nothing unusual in the management of this train, and that the injury that resulted to the plaintiff below was simply an occurrence that took place in the ordinary course of business; and that there can be no recovery upon the evidence as we find it in the record."

Rutledge vs. Missouri Pac. Ry. Co., 19 S. W. Rep., 38. Supreme Court of Missouri (1892):

In this case a train, upon which plaintiff, a brakeman, was uncoupling cars, was suddenly moved, causing him an injury. Demurrer to the evidence overruled.

Held, THOMAS, J. (p. 40):

"On the other hand, if the sudden movement was the result alone of the ordinary operation of the train going on the switch, plaintiff must be held to have assumed the risk of being thrown off the car by it, and therefore, cannot recover. This is one of the risks of

the employment which the law holds that he assumed when he engaged to perform the work assigned him. He mounted the car while in motion and he knew it was going in on a switch and hence, he should have taken proper precautions against the ordinary movements of the train."

To same effect : *Davis vs. Balto. & O. R. R., 152 Pa. St., 314.*

Galveston, H. & S. R. R. vs. Lempe, 59 Tex., 19.

Fisher vs. So. Pac. R. R., 86 Cal.. 399.

International & G. N. Ry. vs. Turner, 23 S. W., 146.

Galveston H. & S. A. R. R. vs. Arispe. (Tex.) 17 S. W., 47.

The opinion of the Circuit Court of Appeals (Tr., p. 129) very clearly seems to have been that there was " considerable if not conclusive ground for such a request," namely, that there was not sufficient evidence to go to the jury on " the question of negligence of the railway company in handling and operating the train, on the ground that the undisputed evidence shows that the train was handled *and operated* in the usual, proper and customary manner." There was such undisputed evidence as above shown.

The Court below, there, therefore, erred its charge in submitting, as it did, the question of such negligence to the jury (Tr., p. 104).

The Court also erred in its charge to the jury (Tr., 104–107) that the defendant was, as respects the plaintiff, charged with the duty, under the circumstances, of making a distinct inspection of the *car of another company* and to see that it was it proper order as to the alleged protruding spike before undertaking to switch the string of cars in the work of making up its train at Big Sandy. We insist, therefore, that the

Court erred in not giving the peremptory instruction requested by defendant to return a verdict in its favor.

The question of protruding nail, is further discussed in connection with the evidence under another head.

II.

The Court erred in its main charge in instructing the jury that the test of negligence on the part of the operatives of the train on which Behymer was hurt was: "Did the parties in charge of the train use ordinary care in handling it?" and throughout the main charge, in instructing the jury that such test was as to whether the train was moved and stopped at the time plaintiff was hurt, with ordinary care, that is, with the care that an ordinarily prudent person under like circumstances would have used, and in refusing to give special charges asked by the company to the effect that if they believed that plaintiff's injuries were caused by his fall from a car, caused by the taking up or running out of the slack, and that such was no greater in degree than is ordinarily incident to the starting or stopping of freight trains, then such was a risk assumed by Behymer in taking employment as a brakeman.

This proposition is founded on the third, eighth, ninth, tenth and eleventh specifications of error herein.

The Court was careful to exclude from his main charge and to erase from the special charges the doctrine of assumed risk, and placed the question of negligence or not upon the fact as to whether the train was being moved and stopped as an ordinarily prudent *person* would have moved and stopped the train in the same way under the same circumstances. Even had the Court been correct in that statement of the law, it does not follow that he should not also have charged upon the question of assumed risk. In no event should the charge have confined the jury to a consideration of what ordinarily prudent *persons* would or would not have done. An ordinarily prudent person having no knowledge or experience in the operation of freight trains, might or might not have moved it in the way it was moved, and the charge should certainly have instructed the jury as to what ordinarily prudent persons having knowledge and experience in the operation of trains would have done.

In that part of the main charge complained of the Court said :

"There has been considerable proof in this case that this particular car or train, of course, was moved and stopped as freight trains are ordinarily moved and stopped. Upon that question it might show that the care required by law was used, or it might not show the care."

What might show ? Clearly, the considerable proof that the train was moved and stopped as trains are ordinarily moved and stopped might show that the care required by law was used, *or it might not show the care*, which is equivalent to stating to the jury that, although the proof might show that the train was moved and stopped as such trains were ordinarily

moved and stopped, that the company might still be guilty of negligence in so moving and stopping it. The law being that, if it was so moved and stopped, and plaintiff was hurt thereby, it was by an exposure to an assumed risk.

It is true that the Court gave the company's special charges Nos. 9 and 11 (Tr., p. 113), but they were general in terms on the question of assumed risk, and were qualified by the Court at the request of Behymer's counsel, so as to render them of no force.

See 10th, 11th and 12th Specifications of Error herein.

The special charges applying to the doctrine the facts of the case were refused (see 8th and 9th Specifications of Error above); and the Court erased from the company's special charge No. 4, before giving it, the language which applied the doctrine of assumed risk (see 15th Specification above).

It is true the Court said in one part of his main charge:

"A person entering into the employ of a railroad in the capacity of a brakeman assumes certain risks. He assumes the risks that are incident to the employment. In other words, that employment is dangerous from the nature of it. A party entering that employment and is injured is debarred from a recovery, except," etc. (Tr., 106).

But that is an abstract statement of the doctrine, and the Court purposely, as is shown throughout the main charge and in the charges refused, refrains from stating to the jury that, if plaintiff was injured by a movement and stopping of the train in the manner in which such trains are usually moved and stopped, he cannot recover. The company's special charges Nos.

10 and 12 embodied correct propositions of law, and should have been given without the qualifications shown in the 11th specification of error above.

Fisher vs. So. Pac. R. Co., 89 Cal., 399.

III.

The Court should have charged that if Behymer's negligence in any degree contributed to his injury, he could not recover.

See 3d specification of error.

IV.

One of the issues made by the pleadings and evidence in the case was as to the dangerous condition of the tops of the cars by reason of ice, and Behymer's assumption of the risk of such condition by going on top of the cars with full knowledge of their condition and its dangers; and the Court should have instructed the jury upon that issue.

This the Court failed to do in the main charge (Tr., 104–109), and it so qualified the company's requested special charge No. 4 on that subject as to render it ineffectual, by erasures and interlineations.

See said special charge No. 4 (Tr., 114).

V.

The Court erred in refusing to give the company's requested special charges Nos. 2 and 8, in substance that if they believed that by proper conduct and submission to treatment Behymer's leg could have been restored to soundness, or a measure of soundness, he could not recover any damages beyond those he might have suffered had he submitted himself to proper medical and surgical treatment and attention.

See 6th and 7th specifications of error above.

It is believed that these charges stated the doctrine correctly and that Behymer's conduct in declining proper treatment and in want of care with and for his broken limb need not have amounted to positive negligence in order to relieve the company from responsibility for damage because of its present condition, when it might have been restored by proper care and treatment. His conduct in declining medical and surgical treatment and care, and in failing to care properly for his limb may have been in the exercise of cool judgement on his part, into which the probability of his recovering large damages for the injury, in case his leg should be in very bad condition at the trial, largely entered. In other words, such conduct may have been in furtherance of a fixed purpose with knowledge of the effect it would have upon his limb, as well as upon the amount he would recover by way of damages. In such case he could in no proper sense be said to be guilty of negligence, and yet, certainly in

such case the company would not be liable for any more than the necessary and proximate consequences of the original accident. There was positive evidence to sustain the theory that Behymer declined treatment and so conducted himself as to enhance his damages. Note his declaration to Dr. Terry, who was advising him to have an operation performed:

"He just picked his foot up and kinder shook it at me and says: 'I want to show that to a jury'" (Tr., p. 84).

Behymer did not deny this, only saying he didn't remember it.

VI.

The Court should have given the company's requested special charges, Nos. 12 and 13b, as shown in the 8th and 9th specifications of error above, in substance that if the movement and stopping of the train at the time of the accident to Behymer and the cause of the accident were such as are usually incident to the moving and stopping of freight trains, then the risk was one assumed by Behymer and he could not recover for any injuries caused thereby.

These special charges were refused and the Court throughout in the main charge and in qualifying other special charges, made the right to recover wholly depend upon the question as to whether the train was moved and stopped as an ordinarily prudent person

under the same circumstances would have moved and stopped such train.

The following cases support our contention on this point:

Davis vs. R. R. Co., 152 Pa. State, 314.
Rutledge vs. R. R. Co., 19 S. W., 38.
R. R. Co. vs. Simms, 80 Ga., 749.
R. R. Co. vs. Arispe, 17 S. W., 47.

VII.

As they embodied correct propositions of law, the Court should have given as requested charges Nos. 10 and 4 as shown in specifications of error above, Nos. 13 and 15, without the qualifications made to them by the Court as given (Tr., 112, 113).

These qualifications were reiterations of the proposition that the company would nevertheless be liable if negligence in the operation of the train was shown, thus placing too prominently and emphatically before the jury in connection with each special charge, the liability of the company in case negligence of its servants had been shown in causing the original accident; and as the Court, in its general and other charges, had again and again stated this doctrine, its only effect in these connections was to make the impression upon the minds of the jury that while all these charges as to the risks assumed by the plaintiff might be good law, they could avail the company nothing, *provided* Behymer's injuries was caused by the negligence of its servants in operating the train.

VIII.

As they embodied correct propositions of law, the Court should have given special charges Nos. 3 and 6 without the qualifications made by the Court (Tr., 113, 114).

See specifications of error Nos. 14 and 16.

The qualifications made were calculated to mislead the jury into the belief that they could award damages for all injuries arising from the original accident, notwithstanding Behymer had not taken proper care of himself, and had not submitted to proper medical and surgical treatment. Again, the qualification to charge No. 6 would exempt the company from liability only in case Behymer's conduct amounted to negligence.

IX.

The verdict of the jury for the plaintiff was not sustained by the evidence; was against the preponderance of the evidence; was grossly excessive in amount and not sustained by either the law or the facts, and the Court should have set aside the verdict and the judgment upon defendant's motion for a new trial.

See 17th, 18th and 19th specifications in error, *supra*.

That this proposition is correct is shown by the facts: (1) That the evidence showed that at the time of the accident the cars from which Behymer fell were being

moved in the ordinary and usual way of handling freight trains, and that the running out and taking up of the slack as testified to by all of the witnesses was no more on that occasion than was usually incident to such movements of freight trains, and that Behymer's fall was caused by such movements in connection with the ice on top of the cars. (2) That all the expert testimony in the case, with which there was no conflict, was to the effect that Behymer's leg by proper care and treatment could have been and can be restored to its original soundness ; that there is no permanent impairment and that its present condition arose solely from his own conduct and lack of medical and surgical attention.

In this connection it is noteworthy that Behymer in both his original and amended petitions, including the one upon which he went to trial, alleges that a large part of his damages accrued from want of care and skillful treatment on the part of the company's surgeons and agents at its hospital, and he alleges that his leg could have been restored had he received proper care and treatment (Tr., 4 and 5, 11 and 12). Upon a demurrer being sustained to those allegations he takes the other tack and inferentially in his evidence charges the whole damages to the original accident.

This case has some peculiar features. In the first place, Behymer's whole case against the company rests upon his own unsupported testimony. Secondly, his testimony is flatly contradicted in many material matters by all the other witnesses, including his own mother. In the third place, not a single physician or medical expert was called as a witness for him. A plaintiff in a damage suit against a railroad company must have a weak case indeed when he cannot bring in

some doctor to testify to the seriousness and permanency of his injuries, and as to the lack of probability of his being restored to soundness by proper surgical and medical attention ; especially so where the defendant has called four or five physicians and surgeons, at least two of whom stand pre-eminent in their profession, who testified that proper surgical treatment and care would have restored Behymer's leg, and that even now a simple operation and careful treatment would restore him to soundness. Without quoting their testimony in full, it is sufficient to say that Dr. B. F. Eads, Dr. Bacon Saunders and Dr. A. B. Terry all testified that with the proper care and treatment and proper conduct on Behymer's part, his leg could have been restored to soundness immediately after it was hurt, and that at the time of the trial, with the very smallest danger to him, his leg could be operated on and fully restored (Tr., 76, 77, 79, 80, 81, 82, 83, 84, 85, 92 and 93).

Drs. Eads, Taylor and Terry all testified to facts showing that Behymer would not follow the instructions and treatment given aim at the railroad hospital, and that the present condition of his leg was caused by his own fault (Tr., 75, 83 and 90).

That Behymer did not wish his leg to be restored and was so conducting himself as to have it in proper condition to show to a jury as a basis for large damages, is shown by his own testimony (Tr., 110), in which he declares that after he left the Marshall hospital he had no further surgical treatment of his leg and had no doctor to treat it ; that he bandaged it himself ; had no bandage on it at the time of the trial, but only a woolen stocking, and had never had any other treatment for it after he left the hospital. This notwith-

standing the fact of his claim that he was not properly treated in the hospital. He gives no reason or excuse for this utter abandonment of all effort to mitigate his injuries or restore his limb. The amputation of his leg at the point of the break would not have authorized such a large verdict.

If the testimony of these physicians be true, and it is unquestioned and unquestionable, awarding this man $10,000 for his injuries, even if caused by negligence of the company, is shocking to the conscience. Without any expense to himself he could have, in October, 1899, had his leg completely restored by a simple operation and treatment in Dr. Saunder's hospital in Fort Worth, and even now by an expenditure of a maximum amount of $500 he can have it restored, and doubtless expects to do so after succeeding in recovering the enormous amount of $10,000 from the company, thus giving him a net profit on the speculation (Saunder's testimony, Tr., 79, 92).

Keeping in view the powerful motive for Behymer to swear falsely, let us now examine in connection with our next point (X.) his and other testimony in the case, in order to determine whether he was at all worthy of belief. This is more important in this case than in most others, because his right to recover depends wholly upon his own testimony.

X.

The Protruding Nail.

Behymer, at the time he fell, was walking on the footboard, going east on top of a box car. The footboard is twelve or eighteen inches wide, extending from end to end of the top of a box car, raised slightly above the roof, and is a passageway for train operatives. We do not think his supposed protruding nail in the footboard is material in the case, save upon the question of Behymer's veracity, for even he does not give the nail as the cause of his fall, but rather as retarding it. It was doubtless intended to be alleged and proven as a cause of the accident; but some times a plaintiff must have a good knowledge of the law in order to lay in his testimony a correct basis for a recovery. He says, in substance:

"The cars rebounded and threw me off my balance, and in trying to regain it the bottom of my pants caught in a nail on the runningboard" (Tr., 33).

Being shown the pants which he was wearing at the time, he said:

"That is where they were tore by a spike. When they caught and jerked me down it tore that place across the right leg at the bottom about three inches long. Suppose it stuck up about two inches. Appeared to be a nail. Discovered it about a second or two before I was jerked down; a second or two before it caught my pants (Tr., 34). The catching of my pants on that nail threw me down. Was staggering towards the end of the car (Tr., 35). At the time I discovered the spike I was staggering around. I saw it just a second before I began to fall (Tr., 36). Saw the nail about the time I began to stagger. *My foot slipped.* Was already slipping on the ice when I saw the spike. Jerk, of course,

started me. Couldn't regain my balance; jerk, too, heavy. Slippery character of the car kept me from regaining my balance some. Think jerk would have thrown me to the other car anyway" (Tr., 40).

The torn place in his pants was near the bottom of the right leg—a horizontal tear about three inches long,—and he says that he first found the torn place over two months afterwards when he went home; that he felt the tear at the time, but never saw it until then (Tr., 41). Didn't remember when, where nor who he first told about his pants catching on a nail. Didn't know that he told any one before he told his attorneys. Told his attorneys when he brought suit (Tr., 46). Didn't remember when he told his father or mother (Tr., 46).

Now, his mother testified that she met him at Longview and went with him on the train to the hospital on the day of the accident, and that she then saw the torn place on the right leg of his pants (Tr., 48), and called his attention to it; showed him where the pants were torn that morning on the way to Marshall (Tr., 48). Said that Abe told her that morning how the torn place came to be there (Tr., 49).

Conductor Key says: That after the accident at Big Sandy he heard Behymer say nothing about his pants catching on a nail, but he merely said he lost his balance and fell (Tr., 52). Immediately after the accident he (Key) sent a car inspector on top of the car to examine it (Tr., 55).

Hamlett, the inspector, says that he examined the car fifteen or twenty minutes after the accident, going all over it, and did not observe anything out of the way, and that there was no spike or nail protruding from the running-board; had also inspected it that

morning before the accident; had a conversation with Behymer concerning it at Big Sandy after the accident, and told him he had a message from Campbell (superintendent) to examine the car and report, and he asked Behymer how he should answer it; and he replied that there wasn't anything wrong with the car and to report it O. K.; that he (Behymer) said nothing about any protruding spike or nail, and that he (Hamlett) observed no torn place on Behymer's pants (Tr., 63 and 64). That Behymer read Campbell's telegram and told him to report the car O. K. (Tr., 64).

Stelson, brakeman, got on top of the car after the accident and rode it down the main line and did not notice any spike or nail (Tr., 68). He heard nothing there that morning about a spike sticking up out of the running-board; thinks he would have seen it if there had been one. Didn't hear anything about Behymer's pants being torn and didn't notice anything of the kind (Tr., 69).

Williams, agent, heard Behymer say immediately after the accident that he slipped and fell off the cars; heard him say nothing about his pants catching on a nail (Tr., 72).

And all these witnesses, who were with Behymer at Big Sandy after he was hurt, including Dr. Dial, the physician, heard him say nothing about his pants catching on a nail and saw no torn place in his pants. Only one witness, J. E. Ferguson (Tr., 88), testified to anything of the sort, and this he afterwards modified (Tr., 98, 101, 102), and he was so thoroughly impeached that counsel for Behymer agreed that Ferguson had told Chew, an agent of the company, about September, 1909, that he heard Behymer say nothing of the kind, and that he observed no tear in his pants at Big Sandy.

And it was further agreed that Dr. Dial, who treated Behymer at Big Sandy, heard him say nothing about catching his pants on a nail or on anything else on top of the car (Tr., 101, 102).

Behymer made and signed a report of the accident immediately after he was hurt—to-wit: on the 7th day of February, 1899, in which he stated emphatically that there was no carelessness on the part of any one in the company's employ tending to cause the accident (Tr., 59); and again on February 25th, while in the hospital at Marshall, he made and signed a statement to like effect (Tr., 58). Dr. Taylor, to whom the last report was given, says that he asked him the questions shown in the form, showed it to him and told him to read it over carefully and that he had it for probably six hours, and then signed it. There was never any claim in the case that he was not in a condition to know what he was doing when he signed these reports, or that he did not know what was in them; and it does seem that if his evidence had been true on the question of the care used in handling the train, he would have known, at least by February 25th, that the less handling of the train caused the accident. That he was in a condition to talk intelligently even at Big Sandy and before he got to the hospital, is shown by the fact that he conversed freely with all the witnesses, and his mother said that when she met him at Longview shortly afterwards that morning on the way to the hospital, he was all right so far as his mind was concerned—was perfectly clear; did not seem like he was hurt (Tr., 49).

Further Points of Conflict.

Behymer testifies to a conversation with Conductor Key just before he went upon the cars, in which he told the conductor that the tops of the cars were dangerous and he didn't wish to go on them (Tr., 32 and 41). Key testified that this was absolutely untrue; that he gave him no such instructions and Behymer made no such statement to him (Tr., 51). Behymer swears emphatically that the car next west of the one he fell off was a box car (Tr., 38). Hamlett, the car inspector (Tr., 65) and Williams, the agent who saw him fall, both testify that he fell off of Southwestern Car No. 6500, and that the next car west of it was an oil tank car (Tr., 72); and Williams produced the record of the cars in that string that morning, which showed that the next car west was a tank car. Williams, as the string of cars passed him, saw Behymer climbing from the tank car on the box car No. 6500 (Tr., 70). Other witnesses corroborated these.

In regard to the interview with Dr. Bacon Saunders at Fort Worth, to whom the company's superintendent, Mr. Campbell, had taken Behymer for treatment, Behymer swears that Dr. Saunders did not say anything about curing him; didn't say he could perform an operation and restore his leg; didn't advise anything; that Campbell didn't tell him he wanted him to go to Saunders' Hospital, and that Saunders didn't teli him he could perform an operation and set his leg and likely restore it (Tr., 44). This was squarely contradicted by Dr. Saunders, who gave a full statement

of the interview and examination of Behymer's leg, and says he told him that by performing an operation he thought it could be restored; that the chances were good, amounting almost to a certainty, and told him that if he would come to his hospital that in his judgment he could make it a useful, good, sound limb; that Behymer took his proposition under advisement and left, and that was the last he saw of him (Tr., 79). Says that Campbell authorized him to go ahead and treat the limb (Tr., 81); that Campbell was present (Tr., 82). In this he was corroborated by Campbell (Tr., 97). Note here that Dr. Dial, who examined the leg at the time of the accident then reported:

"The leg can be, in my judgment, saved and made a good leg" (Tr., 70); and that Behymer "says he slipped and fell to the ground" (Tr., 59).

Behymer said he told Dr. Taylor at Marshall that he thought his leg looked crooked, but that he sneered at it, etc. (Tr., 97). Taylor says this is not true (Tr., 90),

Behymer attempted to weaken the testimony of both Drs. Terry and Taylor by charging them with drunkenness. He would probably have enlarged on that if his allegation as to malpractice in the hospital had not been eliminated.

On the question of the care he used and his submission to advice and treatment while in the hospital, he is squarely contradicted by both Drs. Eads and Taylor, who say that his leg got into its present condition after he left the hospital (see Behymer's testimony, Tr., 36, and that of Taylor and Eads, Tr., 75 and 90).

Behymer's testimony was thus rehdered so incredible that good faith required him to call to its support, if true, any other testimony which might sustain him.

Yet, neither his father nor his sister, the latter of whom appears to have been present when his mother saw him on the train, nor any doctor, were called as witnesses in his behalf, and his mother was only called in the endeavor to sustain him in the nail theory.

While the courts will not ordinarily disturb a verdict for a reasonable amount upon questions of fact passed upon by the jury, it seems to us that this is a case in which the verdict should be set aside on the facts. If verdicts rendered against the overwhelming preponderace of evidence equally credible with that of plaintiff below, and where no such motive to swear falsely can be attributed to the witnesses for the defendant as that justly attributable to Behymer in this case, are to be allowed to stand on appeal, then railroad companies might as well go to the jury upon plaintiff's own testimony alone, with the slender hope that some error of the Judge will afford ground for a new trial or reversal, which is simply deferring the evil day; for it is a fact to which the courts can no longer be blind, that in a railroad or other corporation case the verdict of the jury is certain to be for the plaintiff if there be any evidence, even a "scintilla," on his side upon which to found it, even should the defendant bring hosts of witnesses to impeach or contradict it.

The excessiveness of the amount found by the jury in this case; the fact that the verdict rests solely upon the plaintiff's own testimony; the fact that he is contradicted at almost every material point; the fact that he impeaches himself by solemn written statements which he does not attempt to explain away or modify; all call, it seems to us, for a close scrutiny of this record and for a reversal and remanding of the cause.

Wherefore, for the errors assigned, plaintiff in error prays that the judgment below be in all things reversed and held for naught, and that this cause be remanded for such further procedure herein as this Court may adjudge proper.

Respectfully submitted,

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